92-1404

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

RICHARD S. LEVY — PETITIONER

vs.

UNITED STATES GOVERNMENT, ET AL — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT, DOCKET 91-4216

PETITION FOR WRIT OF CERTIORARI

RICHARD S. LEVY, Pro Se
1703 SE 15th Terr.
Cape Coral, FL 33990
813-458-0508

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT, WASHINGTON, D.C.
FROM THE APPEALS COURT FOR THE
ELEVENTH CIRCUIT, DOCKET 91-4216

QUESTION PRESENTED

1. Does Title III, Public Law, 810 - 80th Congress, 2nd session, June 29, 1948, create the authority for the Department of the Navy to issue regulations to implement this Public Law including use of Veterans Department facilities for health care?

2. On October 10, 1949 was this law and the Navy Regulations in effect and did the Navy legally issue orders to the Plaintiff-Appellant for transfer from an inactive status to an active status in an Organized Reserve component of the military, Appendix A?

3. Did these orders issued to and acted on by the Plaintiff-Appellant, amount to a contract for involuntary services to the United States Government?

4. As such, was this contract, subject to any unilateral changes, ex post facto legislation, or regulation, enacted by the government, or a department of government, subsequent to this date, October 10, 1949?

5. Under the terms of Amendment VII (1791) of the United States Constitution, doesn't Plaintiff-Appellant have the right to a trial by jury?

6. Isn't a Federal District Court, the Middle District Court, Ft. Myers, Florida, the proper Court for the Plaintiff-Appellant to seek redress?

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TABLE OF AUTHORITIES CITED

CASES

William Marbury v. James Madison, Supreme Court of United States Cranch 1, page 75, 1808.

STATUTES

Public Law

Title III, Public Law, 810 - 80th Congress, 2nd session, June 29, 1948.

Navy Retirement Information

Naval Reserve Bulletin, Naval Reserve Personnel Center, New Orleans, Louisiana, 70149, in effect October 10, 1949.

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM 1992

RICHARD S. LEVY — PETITIONER
vs.
UNITED STATES GOVERNMENT, ET AL — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Richard S. Levy, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the eleventh district refusing to remand to the Middle District Court, Fort Myers Division, for trial by jury, a case in common law, as set forth under amendment seven of the United States Constitution.

OPINIONS BELOW

The unpublished Decision of the Eleventh Circuit Court was dated October 29, 1992, Docket 91-4216, Non-Argument Calendar. The unpublished decision was dated December 18, 1992, Docket 91-4216, on petition for rehearing and suggestion of rehearing en banc, "Denied".

JURISDICTION

Plaintiff-Appellant filed a timely appeal in this case on December 11, 1991. The Appeals Court affirmed the lower court's dismissal on October 29, 1992. The Appeals Court denied a timely petition for for rehearing and a suggestion for rehearing en banc on December 18, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

The critical date in this appeal is October 10, 1949. Exhibit A established this as the date that plaintiff-appellant was ordered to active duty as a USNR-O, organized reserves active from the inactive status of USNR-V, Volunteer inactive. This was the date that a contract was entered into by LCDR Richard S. Levy and the Government, under terms of Title III, Public Law, 810 - 80th Congress, June 29, 1948[1] and the Naval Reserve Bulletin Naval, reserve personnel center, New Orleans, Louisiana 70149, in effect on October 10, 1949.[2]

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1. "Sec. 307. The Secretary of . . . the Navy with respect to the personnel of the Navy . . . are authorized to prescribe such rules, regulations, and procedures as they may deem necessary to effectuate the provisions of this title."

2. Para. 4, Subpara. b., sub para 3., "Health care is available to retired members (but not dependents) at facilities of the Veterans Administration on a space-available basis."

Under the U.S. Constitution,[1] any laws enacted by the government after this critical date would be ex post facto with respect to the plaintiff-appellant.

The Supreme Court has held in *Marbury v. Madison*,[2] that any law that was enacted repugnant to the United States Constitution was void. All the laws creating USC 38 were passed subsequent to the above date of October 10, 1949; thereby, making them void with respect to plaintiff-appellant, a retired reserve military.

Under the veterans' laws, the system of appeals does not provide for a jury trial, effectively eliminating the constitutional rights provided by Amendment VII (1791)[3] to plaintiff-appellant, for a trial by jury.

STATEMENT OF CASE

Plaintiff, petitioner, filed suit in the Florida Middle District Court, Fort Myers Division, for Breach of Contract by the United States Government, et al, on August 8, 1991. On November 22, 1991, the complaint was dismissed without prejudice and without a hearing or a jury trial by the Court, case closed. On November 29, 1991, plaintiff petitioner filed a motion for rehearing and reconsideration. On December 4, 1991, the court endorsed plaintiff's motion, "denied".

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1. Article 1, Sec., 9 Para. 3 "No bill of attainder or ex post facto law, shall be passed."

2. Supreme Court of United States, Cranch 1, page 75, 1808, "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

3. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law."

The Appeals Court for the 11th district affirmed on October 29, 1992, and denied petition for rehearing on December 18, 1992.

Although the Plaintiff is a Veteran, his suit was filed as a Retired Reserve Military, for breach of contract by an agency of the United States Government. A Veteran has no contractual relationship with the government, whereas a Retired Reserve Military has.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Constitutional questions involved were not resolved by the Appeals Court. The original complaint was filed by a reserve military on the basis of an offer of a contract by an agency of the United States Government, the Navy Department, authorized under law Title III, of 1948 and the Navy regulations issued under that law, in 1949. An acceptance by the plaintiff-appellant by following Navy orders of October 10, 1949, properly issued by the Navy, Appendix A.

At that time the Navy was authorized to encumber the services of the Veterans' Administration, not then a cabinet post under the executive branch of the government. When the Veterans' Administration became a cabinet post in the government, the authority authorizing such left intact the laws of Title III, 1948.

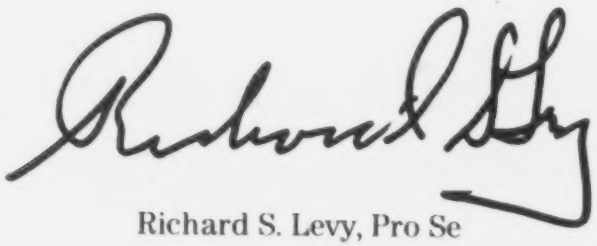
Nowhere under USC 38 is there any reference to RETIRED RESERVE MILITARY. If there were references, they would be void with respect to prior laws based on the ex post facto protections of the U.S. Constitution, Article 1, Sec. 9, Para. 3.

The fact that the Secretary for Veterans' Affairs, a cabinet post, does not acknowledge the liability of his department for servicing retired reserve military, based on the Statute, Title III, 1948, and Navy regulations enacted, therewith, to carry out the intent of the Statute, is an internal government problem. The contract of October 10, 1949 is still valid and in effect.

CONCLUSION

There are literally thousands of retired military reserves that are drawing retired pay based on the obligations and terms of Title III, 1948, but are being denied health care service as RETIRED military reserves. They are being evaluated as Veterans by the Department of Veterans' Affairs. Plaintiff-Appellant is requesting a Writ of Certiorari in order to support the rule by law not rule by man.

Dated
February 1, 1993



Richard S. Levy, Pro Se

49105NA 00V 1274

TRAINING DUTY ORDERS

NDRA-4 DPq-111-ms 107999 Ser. 2664

5 October 1949

FROM: Commandant, THIRD Naval District
90 Church St., New York 7, N. Y.

TO: LCDR. Richard S. LEVY, SE, USNR-D
682 Prospect Ave., Ridgefield, NJ

CREDITED WITH PAY AND ALLOWANCES AMOUNTING TO $127.40		FOR 7 DAYS
INCLUDING TRAVEL TIME		
MILEAGE PAID	P V NO.	TOTAL TAXABLE PAY
$		$ 93.10
SYMBOL NO. 573334		34.30 Allc

Edgar R. Johnstone
R.E. JOHNSTONE, LCDR, SC USN

Subj: Orders to Training Duty with Pay, Chargeable to Appropriation "Naval Reserve".

1. In accordance with the provisions of law pertaining to the annual performance of training duty by members of the United States Naval Reserve, you will report to the Medical Officer, OrgSurfBatt. 3-5, USS LST 731, Foot of Essex St., Jersey City 2, N. J.

~~prior~~ prior to 10 Oct. '49 for physical examination. If found NOT physically qualified, the remainder of these orders is cancelled.

2. If in all respects qualified, you will report to COM3, (Asst. c/s for Operations) 90 Church St., N.Y.C.

prior to 0900 for 7 days training duty WITH PAY commencing on ~~October~~ 10 Oct. 1949 INABILITY TO COMPLY WITH THESE ORDERS MUST BE REPORTED TO THE ORIGINATOR IMMEDIATELY. Upon completion of this training duty you will be processed and released from training duty, at which time you will return to point at which orders were addressed. If issued Government-owned clothing, you will return immediately to point at which such clothing was received by you and return clothing to issuing activity prior to return to point at which orders were addressed.

3. You are entitled to active duty pay and allowances for the number of days training duty specified above plus the time actually employed in travel in reporting to and upon detachment from training duty. Pay and allowances for time actually employed in travel may not exceed the time normally required to travel, via the shortest usually traveled route, from the place from which ordered to training duty to the place of reporting for training duty, and from the place of detachment to the place from which ordered to training duty.

4. Your records indicate that you have net service for pay purposes computed in accordance with the Pay Readjustment Act of 1942, as amended, totalling 8 years, 4 months, and 15 days, computed to* 10 Oct. 1949 and that you have executed the required affidavit stating that you are not drawing a pension, disability allowance, disability compensation for your own service connected disability, or retired pay from the Government of the United States. Allotment 21C03 Pay 71660 Travel 71660

DF: OrgShip Repair Div. 3-2
Fiscal

W. E. DeLany
COMMANDER

ACTION	PLACE	DATE & HOUR	SIGNATURE
RECEIVED ORDERS	[illegible]	10/6/49	RESERVIST
DEPARTED	Seafield N.J.	0600 10/6/49	[illegible]
PHYSICALLY QUALIFIED YES	HD.3TRS., 3rd ND, NY, NY.	1200 9-7-49	[illegible]
REPORT TO			[illegible]
REPORTED	[illegible]	1400 10-10-49	[illegible]
REPORT TO			[illegible]
REPORTED FOR TRAINING			[illegible]
PHYSICAL EXAM FOR RELEASE	HD.3TRS., 3rd ND, NY, NY.	1100 10-17-49	[illegible]
DUTY COMPLETED RELEASED FROM TRADU COPY OF ORDERS DISTRIBUTED IN ACC'D NRMAL 5-49 CARRY OUT-BASIC ORDERS	HD.3TRS, 3rd ND, NY, NY	1100 10-17-49	[illegible] USN
GOVERNMENT OWNED CLOTHING RETURNED			RECEIVER

* Computations to be to and including the day prior to commencement of training.

Appendix A

BEST AVAILABLE COPY

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-4216
Non-Argument Calendar

D. C. Docket No. 91-215-CIV-FtM-17D

RICHARD S. LEVY,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS OF U.S.,
SECRETARY, DEPARTMENT OF DEFENSE OF U.S.,
FRED WASSERMAN, DR.,
PHILIP W. COOLEY, DR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(October 29, 1992)

Before TJOFLAT, Chief Judge, HATCHETT, and DUBINA, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-4216

RICHARD S. LEVY,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS OF U.S.,
SECRETARY, DEPARTMENT OF DEFENSE OF U.S.,
FRED WASSERMAN, DR.,
PHILIP W. COOLEY, DR.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 29, 11th Cir., 1992, _____ F.2d_____).

Before TJOFLAT, Chief Judge, HATCHETT, and DUBINA, Circuit Judes.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Appendix C

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

GERALD TJOFLAT

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD S. LEVY,
Plaintiff,

vs. CASE NO. 91-215-CIV-FTM-17

UNITED STATES OF AMERICA,
et al.,
Defendants.

_____ /

ORDER GRANTING MOTION TO DISMISS

This cause is before the Court on Defendants' Motion to Dismiss, and Plaintiff's response thereto.

The Government contends that this action is premature in that there is a currently pending appeal of the same claims before the Board of Veteran's Appeals, which may require eight to ten months for resolution. The Government further contends that the correct forum for review in the Court of Veteran's Appeals, and review of any decision of the Court of Veteran's Appeals is in the United States Court of Appeals for the Federal Circuit. After consideration the Court grants the motion to dismiss for failure to exhaust administrative remedies, and because this Court is not the correct forum. Accordingly, it is

ORDERED that this case is dismissed without prejudice, and the Clerk of the Court shall enter a final judgment of dismissal.

DONE and ORDERED in Chambers in Tampa, Florida on this 22nd day of November, 1991.

ELIZABETH A. KOVACHEVICH
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD S. LEVY	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	91-215-Civ-
	)	FtM-17D
UNITED STATES OF AMERICA, ET AL.	)	
	)	
1A. SECRETARY FOR THE DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES, WASHINGTON, D.C.	)	
	)	
1B. SECRETARY FOR THE DEPARTMENT OF DEFENSE OF THE UNITED STATES, WASHINGTON, D.C.	)	
	)	
2. FRED WASSERMAN, M.D. CHIEF OUTPATIENT CLINIC VETERANS ADMINISTRATION 2070 CARRELL RD., FORT MYERS, FL., 33901	)	
	)	
3. PHILIP W. COOLEY MEDICAL ADMINISTRATIVE OFFICER VETERANS ADMINISTRATION 2070 CARRELL RD., FORT MYERS, FL., 33901	)	
	)	
DEFENDANTS	)	

MOTION TO RECONSIDER AND REHEAR

1. Your order, dated 22 November, 1991, dismisses all defendants.

2. I have sued the Secretary for the Department of Defense, IB., on a contract breached by the Department of Defense.

3. Does your order mean that I cannot sue the Secretary of the Department of Defense for Breach of Contract?

4. If I may sue the Secretary of the Department of Defense please order the Secretary of the Department of Defense to answer and set a date for trial.

5. If I may not sue please set forth the reason in your order.

6. I ask for an immediate hearing on this motion for medical reasons. Letter enclosed.

7. I have sent a copy of this motion to Robert W. Genzman
United States Attorney
500 Zack St., Suite 410
Tampa, FL 33602

signature
Richard S. Levy
1703 SE 15th Ter.
Cape Coral, FL 33990

DENIED AND SO ORDERED
this 3rd day of December, 1991.

Elizabeth A. Kovachevich
U.S. District Judge